

	OAH 3-0900-18017-2
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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HEALTH

In the Matter of the Denial of the Renewal Application for Asbestos Worker Certification of Larry A. Tate	FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION
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This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on June 6, 2007. The OAH record closed at the conclusion of the hearing that day.

Gregory J. Schaefer, Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared for the Department of Health (Department).

Larry A. Tate (Applicant), 655 Blair Avenue, St. Paul, MN 55119, appeared for himself without counsel.

STATEMENT OF THE ISSUES

Did the Department properly deny the Applicant's renewal application for asbestos worker certification pursuant to Minn. Stat. § 144.99, subd. 8 (2006)?

The Administrative Law Judge concludes the Department properly denied the application based on the Applicant's persistent pattern of violations relating to certification.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Applicant has been employed by an asbestos contractor called Aardvark Abatement for several years. In September 2000, the Applicant was an asbestos site supervisor for Aardvark Abatement, and he had the requisite certification from the Department.

2. On September 14, 2000, the Department conducted an inspection of asbestos removal work being done by Aardvark Abatement at 5356 37th Avenue South in Minneapolis. The Applicant was the project site supervisor.

The inspectors found that asbestos tape had been left on ductwork that had been removed from the home and was lying outside in the back yard of the residence. They cited the Applicant for violations of two rules intended to prevent asbestos fibers from becoming airborne: one requiring that asbestos-containing material be placed and sealed in containers while the material is adequately wet,¹ and one requiring that asbestos-containing material must not be allowed to dry.²

3. On October 11, 2000, the Department conducted another inspection of asbestos-removal work being done by Aardvark Abatement at 5115 Drew Avenue South in Minneapolis. Inspectors observed asbestos-containing residue and debris remaining on a section of an old air duct, and loose asbestos-containing material encapsulated on another section of the air duct and on wooden floor joists. The Applicant was the site supervisor on this project. The Department issued citations for violations of rules requiring that loose or hanging asbestos-containing material must be removed before encapsulation; encapsulated asbestos-containing material must be specially designated, pursuant to 29 C.F.R. § 1926.1101(k)(8), to warn individuals who may disturb the material; and after removal of asbestos-containing material, interior surfaces of the containment and decontamination unit must be cleaned until no asbestos dust, residue, dirt, or debris is visible on any part of the work area.³

4. Based on the above violations, the Department issued the Applicant a Correction Order requiring him to take a refresher training course for asbestos site supervisors. The Applicant complied with the correction order.⁴

5. On June 19, 2001, the Department conducted an inspection of asbestos-removal work being done by Aardvark Abatement at 3517 Pillsbury Avenue South in Minneapolis. Inspectors observed that negative air pressure measurement documents were not completed correctly, the water heater was not covered with a critical barrier, and the openings in the ceiling joist system in the containment area were not sealed. In addition, the decontamination unit was not supplied with water during the active removal and clean-up of asbestos-containing materials, and the recording manometer was placed directly in front of the intake of the HEPA-filter equipped ventilation system. The Applicant was the site supervisor on this project. Inspectors issued citations for violations of rules requiring that measurements of negative air pressure must clearly indicate the date, time, and containment to which the measurement applies; all objects that cannot be removed from, and all openings into the containment area must be covered with at least one layer of polyethylene plastic sheeting securely fastened to achieve an airtight seal around the object or opening; decontamination units must have a shower room that is supplied with hot and cold water adjustable at

¹ Ex. 1 at 1-2; Minn. R. 4620.3571, subp. 1 C.

² Ex. 1 at 2; Minn. R. 4620.3571, subp. 1 D.

³ Ex. 1 at 2; Minn. R. 4620.3572 A, E; Minn. R. 4620.3575, subp. 1 B.

⁴ Ex. 1 at 2.

the tap; and the recording manometer must be placed as far from the intake of the HEPA-filter equipped ventilation system as possible.⁵

6. Based on these violations, the Department suspended the Applicant's site supervisor certification for six months and required the Applicant to re-complete the initial training necessary for site supervisor certification. The Applicant completed the re-training requirements during his six-month suspension, and the Department reinstated his site supervisor certification.⁶

7. On July 24, 2002, and August 6, 2002, the Department conducted inspections of asbestos-removal work being done by Aardvark Abatement at a residence in Inver Grove Heights, Minnesota. During the initial inspection, inspectors noted deficiencies in the asbestos-removal work being conducted at this site and notified the Applicant, who was the site supervisor, of the need to correct them. Upon re-inspection, the inspectors found the same deficiencies. The Department issued citations to the Applicant for violation of rules requiring thorough cleaning of the containment area, decontamination unit, and areas in which contamination is observed.⁷

8. On October 4, 2002, the Department conducted an inspection of asbestos-removal work being done by Aardvark Abatement at 3739 Aldrich Avenue North in Minneapolis. Inspectors observed that sheet-metal ductwork with asbestos-containing material had been removed and left outside near the garage. It was not wrapped or labeled with the appropriate warning signs. The Applicant was the site supervisor for this project. The Department issued him a citation for violation of a rule requiring that when such facilities are completely removed, they must be wrapped in two layers of polyethylene sheeting.⁸

9. Based on the violations that occurred in July, August, and October 2002, the Department issued an Order revoking the Applicant's site supervisor certification. The Applicant requested a hearing. The matter was resolved when the Applicant agreed to surrender his site supervisor certification and the Department agreed to allow him to work as a certified asbestos worker, after completion of refresher training for that certification. The Applicant completed the training, and the Department certified him to be an asbestos worker.⁹

10. On October 31, 2006, the Department conducted an inspection of asbestos-removal work being done by Aardvark Abatement at 4901 Elliot Avenue South in Minneapolis. The inspectors observed that the containment area and critical barriers had been removed before receiving air sample results from an analytical laboratory, the HEPA-filtered negative air machine was continuing to

⁵ Ex. 1 at 2; Minn. R. 4620.3440 D; Minn. R. 4620.3567 A & E; Minn. R. 4620.3569, subp. 1 D (3); and Minn. R. 4620.3570, subp. 4 C (1).

⁶ Ex. 1 at 2.

⁷ Ex. 1 at 2-3; Minn. R. 4620.3575, subp. 1 B; *id.*, subp. 7 A & B.

⁸ Ex. 1 at 3; Minn. R. 4620.3582, subp. 3 C.

⁹ Ex. 1 at 3.

run, and negative air pressure had not been maintained. The Applicant was the worker responsible for air monitoring on this project. The Applicant told inspectors that his supervisor had directed him to submit air samples to the laboratory after the containment area was torn down and cleaned. The inspectors issued citations to the Applicant for violations of rules requiring the maintenance of negative air pressure at certain levels and prohibiting the removal of critical barriers, the containment unit, and the decontamination unit until after the results of clearance air sampling are obtained.¹⁰

11. Aardvark Abatement was given the same citations as were issued to the Applicant, from September 2000 forward. In response to the last citations, the Department issued Aardvark Abatement an Administrative Penalty Order, with which Aardvark Abatement complied. Aardvark Abatement is still a licensed asbestos contractor.¹¹

12. On January 19, 2006, the Department notified the Applicant of its intent to revoke his asbestos worker certification and his right to request a hearing.¹² The Applicant did not request a hearing.¹³

13. On March 7, 2007, the Applicant's asbestos worker certification expired.¹⁴

14. On March 23, 2007, the Applicant submitted an application for asbestos worker certification to the Department.¹⁵

15. On April 4, 2007, the Department notified the Applicant that his application was denied on the basis of the unresolved violations in connection with the citations issued on October 31, 2006. The Department also notified the Applicant of his right to request a hearing.¹⁶

16. On April 25, 2007, the Department received the Applicant's appeal letter, which was dated February 24, 2007.¹⁷

17. On May 3, 2007, the Department served on the Applicant by U.S. Mail a Notice and Order for Hearing, scheduling a hearing to take place on June 6, 2007.

18. The hearing took place as scheduled on June 6, 2007.

¹⁰ Ex. 1 at 3-4; Testimony of Bruce Lange; Minn. R. 4620.3570, subp. 4 B; Minn. R. 4620.3575, subp. 5; and Minn. R. 4620.3594, subp. 2 C.

¹¹ Test. of B. Lange.

¹² Ex. 1.

¹³ Test. of B. Lange.

¹⁴ Test. of B. Lange.

¹⁵ Ex. 2.

¹⁶ Ex. 3.

¹⁷ Ex. 4.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Health and the Administrative Law Judge have authority to consider this matter pursuant to Minn. Stat. §§ 14.50 and 144.99, subd. 10.

2. The Department has complied with all relevant procedural requirements.

3. The Commissioner may deny or refuse to renew an application for asbestos worker certification if the applicant does not meet or fails to maintain the minimum qualifications for holding the certificate or has any unresolved violations related to the activity for which the certificate was issued.¹⁸

4. The Commissioner properly refused to renew the application for asbestos worker certification because the Applicant had unresolved violations in connection with asbestos-removal work performed in October 2006, which were pending at the time he applied for renewal.

5. The Commissioner may also deny or refuse to renew an application for asbestos worker certification if the applicant has a persistent pattern of violations related to the certificate, or if the applicant submitted false material information to the department in connection with the application.¹⁹

6. The Commissioner properly refused to renew the application for asbestos worker certification based on the Applicant's persistent pattern of violations relating to the certificate.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that the Commissioner AFFIRM the decision to deny the Applicant's renewal application for asbestos worker certification.

Dated: June 22, 2007

s/Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

¹⁸ Minn. Stat. § 144.99, subd. 8(a).

¹⁹ Minn. Stat. § 144.99, subd. 8(b).

Reported: Digitally recorded, no transcript prepared.

MEMORANDUM

The Applicant has not challenged the facts underlying the citations issued to him in October 2006. The defense he asserted at the hearing was that the penalty of denial of certification was too harsh, particularly when he was acting in accordance with his supervisor's directions with regard to the violations occurring in October 2006. While it does seem surprising that Aardvark Abatement, the company ultimately responsible for the actions of its site supervisors and asbestos abatement workers, is still a licensed contractor, but the Applicant as an individual employee will no longer be permitted to work in the field of asbestos removal, it is not a defense to the denial of the Applicant's application for certification that others should perhaps have been sanctioned more severely. The record reflects that the Applicant, both as a site supervisor and asbestos worker, demonstrated a persistent pattern of serious violations that could have jeopardized his own health, that of other workers, and that of homeowners for whom the asbestos removal work was performed. The Commissioner properly denied the renewal of his application.

K.D.S.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Julie Frokjer, 85 E. Seventh Place, Suite 220, St. Paul, MN 55101, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.